SINGAPORE REPORTS

THE "HALCYON ISLE" TODD SHIPYARDS CORPORATION v. THE "HALCYON ISLE" OWNERS & OTHER PERSONS INTERESTED

[C.A. (Wee Chong Jin C.J., Chua & Rajah JJ.) December 8, 1977]

[Singapore — Civil Appeal Nos. 6 & 7 of 1977]

Conflict of Laws — Shipping — Several claims against proceeds of sale of mortgaged ship — Maritime lien — Ship-repairers were holders of maritime lien under U.S. law — Whether ship-repairers could claim priority over mortgagees — Lex fori — High Court (Admiralty Jurisdiction) Act (Cap. 6), s. 4(3).

Shipping Law — Maritime lien — Nature of, discussed.

The ship "Halcyon Isle" was arrested by "BTI", mortgagees of this vessel on September 5, 1974 in Singapore. The ship was subsequently sold on March 5, 1975 and the proceeds were paid into court. There were in all 13 claims. With the exception of the plaintiffs there were no disputes in regard to the priority of payments to the several claimants against the said funds. The plaintiffs claimed priorty of payment before "BTI" Mortgagee's claim No. 12. The plaintiffs' claim is for $237,011 with interest for repairs executed, materials supplied and services rendered to the vessel "Halcyon Isle" at their repair yard at Brooklyn, New York during March, 1974 pursuant to a contract with the owners. The plaintiffs contended that their claim for repairs done to the said vessel under the laws of the United States of America carried a maritime lien on the vessel and hence over the said fund and they were entitled to priority of payment on their claim over "BTI" Mortgagee's claim which was merely that of a mortgagee of the vessel.

The mortgagees moved the High Court to determine the priority of payments to the several claimants against the proceeds of sale of the ship. The ship-repairers had earlier applied for a declaration that they were entitled to a maritime lien in respect of their claim. The High Court heard the mortgagee's motion and the adjourned motion of the ship-repairers for a declaration at the same time and dismissed the ship repairers' claim for the declaration they sought and held that the mortgagees were entitled to rank before the ship repairers to payment of the proceeds of sale ([1977] 1 M.L.J. 145). The ship repairers appealed and the sole question in the two appeals was whether or not in a Singapore court the claim of the ship repairers for repairs executed in New York has priority as against the proceeds of sale of the ship over the claim of the mortgages of the ship.

Held, allowing both appeals: having ascertained that under American law a person who furnished in America repairs to a ship acquired a valid maritime lien on the ship, a Singapore court, applying Singapore remedies, would rank a claimant who had a valid maritime lien, which was in its nature a substantive right in the ship, above a claimant who had a mortgage over the ship.

Cases referred to:-

(1) *The Tolten* [1946] P. 135.
(2) *The Tervaete* [1922] P. 259.
(3) *The Colorado* [1923] P. 102.
(4) *The "Ioannis Daskalelis"* [1974] 1 Lloyd's Rep. 174.
(5) *The Zigurds* [1932] P. 113.
(6) *The Acrux* [1965] P. 391.

COURT OF APPEAL.

Richard Stone Q.C. (*Raj Kumar* with him) for the appellants.

Michael Thomas Q.C. (*Loh Boon Huat* with him) for the respondents.

Wee Chong Jin C.J.: Todd Shipyards Corporation, an American corporation, pursuant to a contract entered into in New York executed repairs and supplied materials at their repair yard at Brooklyn, New York, U.S.A. in March 1974 to the ship "Halcyon Isle", a British ship. They sued the owners of the ship in the High Court in Admiralty in Rem No. 150 of 1974 issued on August 24, 1974 claiming $237,011 as remaining due and owing to them in respect of the said repairs. They contend that under American law they are entitled to a maritime lien on the ship in respect of their claim for repairs. They contend that their maritime lien on the ship confers upon them rights of the same nature and quality as is conferred upon the holder of a maritime lien under the law of Singapore and that they are entitled to and/or have a maritime lien in respect of their claim within the meaning of section 4(3) of the High Court (Admiralty Jurisdiction) Act.

Bankers Trust International Limited, an English company, had a first mortgage dated March 1, 1973 registered in London on May 8, 1974 in respect of the ship. They sued the owners of the ship in the High Court in Admiralty in Rem No. 151 of 1974 issued on August 28, 1974 claiming $14,413,000 as due and owing on the said mortgage. In September 1974 the ship while in Singapore waters was arrested by the mortgagees and pursuant to an order of the High Court was eventually sold for $1,380,000 in February 1975 and the proceeds of sale were paid into court. The mortgagees obtained judgment on their claim for $14,413,000 also in February 1975.

In July 1974 Todd Shipyards Corporation (hereinafter referred to as "the ship repairers") moved the High Court for, *inter alia*, the following orders: —

1. A declaration that the plaintiffs are entitled to and/or have a maritime lien in respect of their claim against the "Halcyon Isle" within the meaning of section 4(3) of the High Court (Admiralty Jurisdiction) Act (Cap. 6 of the Revised Edition (1970)).

2. That judgment be entered for the plaintiffs in the sum of $237,011 being the equivalent of US$95,569 together with interest thereon at the rate of 8% per annum from the 1st of August 1974 to date of judgment or at such other rate and for such other period as to this Honourable Court seems just.

The mortgagees intervened in that application and the prayer for a declaration was adjourned but the court gave judgment in favour of the ship repairers for $237,011. Subsequently the mortgagees moved the High Court to determine the priority of payments to the several claimants against the proceeds of sale of the ship. The only claimants claiming priority as against the mortgagees were the ship repairers who contend they have a maritime lien on the ship.

The High Court heard the mortgagee's motion and the adjourned motion of the ship repairers for a declaration at the same time and dismissed the ship repairers' claim for the declaration they sought and held that the mortgagees were entitled to rank before the ship repairers to payment of the proceeds of sale.

The ship repairers now appeal and the sole question in the two appeals is whether or not in a Singapore court the claim of the ship repairers for repairs

executed in New York has priority as against the proceeds of sale of the ship over the claim of the mortgagees of the ship. It is not in dispute that under the law of Singapore the claim of a mortgagee has priority as against the proceeds of sale of a ship over the claim of a ship repairer for repairs executed in Singapore and that under the law of Singapore ship repairers do not have a maritime lien on a ship for repairs executed in Singapore. It is also not in dispute that a claimant who has a maritime lien under the law of Singapore has priority over a mortgagee claimant.

The foundation of the ship repairers' claim that they are entitled to priority over the mortgagees is that by American law they have acquired a maritime lien on the ship and that the law of Singapore will recognise and enforce their maritime lien in determining the priority of payments of competing claimants. Their argument is that a maritime lien is a substantive right in a ship attaching at the time the cause of action arose and not defeated by a subsequent *bona fide* purchaser without notice. It being a substantive right in the ship the law of Singapore recognises that right and enforces it when determining the priorities of competing claimants to the proceeds of sale of the ship.

The mortgagees accept that the ship repairers under American law have a maritime lien but contend that by the law of Singapore a maritime lien is not a substantive right in a ship but is merely a remedial right entitling certain creditors to seize a ship with the aid of the Admiralty court process and compel its sale regardless of ownership. They say foreign law will be admitted only when the nature of the claim asserted is not known to the court in order to enable the court to identify the nature of the claim to decide whether or not to accept jurisdiction, what remedy is appropriate and how to fit the claim into the order of priorities. They say that the nature of the ship repairers' claim in the present case is a claim for repairs carried out to a ship which is a claim well known to the court and that the ship repairers in electing to invoke the jurisdiction of a Singapore court are only entitled to avail themselves of the remedies given by the *lex fori*. They say that the nature of the claim being a claim for repairs carried out to a ship the court has jurisdiction to hear and determine such a claim and in fact has given judgment in favour of the ship repairers on their claim for repairs but in determining priorities the court will apply the *lex fori* only and will disregard the position under American law.

The nature of a maritime lien is dealt with exhaustively by Scott L.J. in *The Tolten*.[1] At page 144 he said:—

"The maritime lien is one of the first principles of the law of the sea, and very far-reaching in its effects. In the *Bold Buccleugh*, Sir John Jervis delivering the judgment of the Privy Council, said this: 'Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (I Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches.' The learned judge in that judgment added an *obiter dictum* which was subsequently disapproved; but that error does not touch the passage I have quoted. In the *Sara*, Lord Macnaghten said: 'A maritime lien', as was observed in the *Two Ellens* must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged ... It commences and there it continues binding on the ship until it comes to an end.' In the *Ripon City*, Gorell Barns J. reviewed the history of the maritime lien in our law in a long judgment from which, so far as I know, there has been no subsequent dissent. The following extracts describe the essential characteristics. He said: 'The definition of a maritime lien as recognized by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried effect into by legal process.' Later on he continued: into 'The result of my examination of these principles and authorities is as follows: The law now recognizes maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another — *a jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing'."

Later on, at page 145, Scott L.J. said:—

"The positive principle of the automatic attachment to the ship of the creditor's lien on it is, at least, as indubitably a rule of substantive law in admiralty, as the negative principle, on which the Mocambique rule rests, is at common law, and, I think, more so. I can see no *prima facie* reason why the admiralty principle should give way to the common law rule. That the creditor secured by his lien will be deprived of a vested right of property, if the court is prevented by the Mocambique rule from enforcing his lien, is obvious."

Again, at page 150, Scott L.J. said:—

"The essence of the 'privilege' was and still is, whether in Continental or in English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the 'privileged' creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence of mortgages."

It seems to us from the above passages that Scott L.J. was of the view that a maritime lien is a privileged claim and that the essence of the privilege is that it confers a true charge on the ship of a proprietary kind in favour of the "privileged" creditor.

In an earlier case, *The Tervaete*[2] the nature of a maritime lien was also considered by the English Court of Appeal. Bankes L.J. spoke of a maritime lien as creating a *jus in re aliena*, a subtraction from the property in the following passage at pages 266-267:—

"In spite of the fact that so far I have accepted the arguments of the respondents in support of the judgment of the President, I am unable to agree with his final conclusion, and I do so upon a point to which his attention does not appear to have been specially directed. The point is founded partly upon the effect upon the property of the sovereign state if a maritime lien attached to the Tervaete as alleged, and partly upon a consideration of the nature of a maritime lien itself. If the judgment of the President is right, and the maritime lien attached to the Tervaete, the value of the vessel to the Belgian Government must necessarily have been affected: how seriously of course depends upon the amount of the respondents' claim. A vessel to which a maritime lien extends for any substantial amount must necessarily be worth less in the market than if she was free from any lien. In *The Bold Buccleugh* Sir John Jervis when dealing with the

question of a maritime lien adopts Lord Tenterden's definition of it, as a claim or privilege to be carried into effect by legal process; and he then goes on to say that a maritime lien is the foundation of the proceedings *in rem*, a process to make perfect a right inchoate from the moment the lien attaches. In *Currie v. M'Knight* Lord Watson speaks of a maritime lien as a remedy against the *corpus* of the offending ship. Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it cannot, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power and being used for public purposes. To allow such a lien to attach would be, to use Gorell Barnes J.'s language in *The Ripon City*, to create a *jus in re aliena*, a subtraction from the absolute property of the sovereign state."

Scrutton L.J. spoke of it as "a priority in claim over the proceeds of sale of the ship in preference to other claimants" in the following passage at page 270: —

"The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. It does not appear *eo nomine* in cases of collision in the reports till *The Bold Buccleugh* was heard in 1851, where it is defined as a claim or privilege upon a thing to be carried into effect by legal process; and it is stated, erroneously as is now admitted, that wherever an action *in rem* lies there a maritime lien exists. The report proceeds: 'This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached'."

Atkin L.J. spoke of it as "confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold" (see page 274).

A year later in *The Colorado*,[3] Scrutton L.J. spoke of a French hypotheque as not a right of property in the ship but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner and proceeded to say that "such a right is the same as a maritime lien as described by Mellish L.J. in *The Two Ellens*, by Gorell Barnes J. *in The Ripon City* and by this Court in *The Tervate*"[2] (see page 109). Atkin L.J. spoke of a hypotheque as a right to have the ship seized and the proceeds applied to payment of the hypotheque, notwithstanding a change of ownership and proceeded to say that it is "a right closely resembling a maritime lien" (see page 111).

In our opinion, having regard to the authorities which were referred to in the judgment of Scott L.J. in *The Tolten*,[1] a maritime lien is a substantive right in the ship which attaches at the time the cause of action arose and which is not defeated by a subsequent *bona fide* purchaser of the ship without notice of the lien. It is in the words of Scott L.J. "a vested right of property" and "confers a true charge on the ship and freight of a proprietary kind in favour of the 'privileged' creditor."

Having come to the conclusion that a maritime lien is in its nature a substantive right the decisive question is, as regards priorities, whether a Singapore court will give effect to the ship repairers' maritime lien acquired under foreign law. Unquestionably, as between competing creditors of the owners of the *res*, the priority of claims against the *res* is governed by the law of Singapore, the *lex fori*.

Apart from authority, we are of the opinion that in principle the courts of this country ought to recognise the substantive right acquired under foreign law as a valid right and to give effect to that recognition when determining the question of priorities between the ship repairers and the mortgagees of the *res*.

In Canada, the Supreme Court of Canada so decided in the case of The *"Ioannis Daskalelis"*[4] where the court, in a unanimous decision, held that a ship repairer who had under American law acquired a valid maritime lien for necessary repairs to a ship took precedence over the mortgagee of the *res*. Ritchie J. who delivered the judgment of the court cited a passage in *Cheshire's* Private International Law (9th Ed. at page 696) as correctly summarising the law in England in this regard. The passage reads as follows:

"*Priorities.* It has consistently been held that the order in which property in the possession of the court is distributable among creditors must be governed by English law. The priority of creditors in such a case is a procedural matter that is determinable by the *lex fori*. It forms no part of the transaction under which a creditor has acquired his right. It is extrinsic, and comprises in effect a privilege dependent upon the law of the country where the remedy is sought. Thus priorities of creditors claiming in bankruptcy or in the administration of a deceased insolvent's estate are governed exclusively by the *lex fori*. It is the same in the case of liens. Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.

In the case of a right *in rem* such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature. When the nature of the right is thus ascertained the principle of procedure then comes into play and ordains that the order of payment prescribed by English law for a right of that particular kind shall govern."

Ritchie J. at page 178 also considered the English case of *The Colorado, supra*, decided by the Court of Appeal "as authority for the contention that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English courts will recognise it and will accord it the priority which a right *of that nature* would be given under English procedure."

A decision of the Supreme Court of Canada, particularly a unanimous decision, is of the highest persuasive authority on questions of admiralty jurisdiction, maritime law and priorities. This is so because historically our two countries have inherited the law on these matters from the law of England and the law of our two countries has developed in conformity with and to preserve uniformity with the law of England on these matters.

It is contended on behalf of the mortgagees that the Supreme Court of Canada misinterpreted the true *ratio decidendi* of *The Colorado*[3] and contrary to the interpretation adopted by the English courts in *The Zigurds*[5] and *The Acrux*.[6]

In *The Zigurds*,[5] Langton J. at page 125 said: —

"Mr. Atkin for the mortgagee claims *The Colorado* as an authority in his favour. It certainly is so to this extent, that it is only one more of the long line of authorities which have established that the English Courts will look to English law and English law only for the purpose of ranking competing claims against a ship or its proceeds. Because in *The Colorado* case the Court, in special circumstances, first turned aside to look at a foreign law, in order to obtain light concerning the legal character of a foreign instrument, I do not think that the case can be claimed as an authority for the introduction of any foreign law which any party chooses to adduce in order to qualify and alter the English rules of ranking. Indeed it is noteworthy that both Hill J. and the Court of Appeal declined to take any note of the French law in the matter outside of the instruction which they derived from the evidence as to the nature of a French 'hypotheque'. Once they were clear as to what it was, they returned at once to the English law to decide the order of its ranking."

In *The Acrux*,[6] Hewson J. at page 404 said: —

"I have been referred in this connection to *The Tagus, The Colorado,* and *The Zigurds.* Those were cases dealing with priorities after jurisdiction has been either accepted or established, but under the authority of those cases, especially *The Colorado,* which went to the Court of Appeal, I must look at the foreign law to see what kind of a claim is being made, to identify it, and then see if this court has jurisdiction and, if so, what remedy to give.

In *The Colorado* Atkin L.J. said: 'Where parties are litigating in this country in respect of rights created elsewhere, to ascertain their rights we may look, in appropriate cases, to the law of their country where the contract was made ... A claimant claims as possessing a maritime lien. This might appear to be an intermediate case, as a maritime lien gives a right against the ship, which continues notwithstanding a change of ownership. Nevertheless, in determining whether there exists a maritime lien the court will apply the *lex fori,* and will give effect to the lien as it exists by English law'."

We must therefore examine the judgments in *The Colorado, supra.* Bankes L.J. at page 106 said: —

"The judgment (of Hill J. in the court below) is expressed to be without prejudice to other claims against the vessel, and all questions or priorities are reserved. This, in my opinion, leaves the question quite open as to what the rights created by the so-called mortgage deed are. This question must be determined according to French law, as the contract was made in France, though the question of priority must be decided by English law."

Then at page 107, Bankes L.J. continued:—

"in my opinion the learned judge was quite right in taking the view he did — namely, that the right created by the mortgage deed was a higher right than a mere right to proceed *in rem,* and though not capable of exact description in terms applicable to well recognised English rights, it yet had attributes which entitled it to rank on a question of priorities in the same class as a maritime lien or the right created by an English mortgage."

Scrutton L.J. at page 108 said:—

"It is clear law in England, as stated by Lord Brougham in *Don* v. *Lippmann,* that 'whatever relates to the remedy to be enforced, must be determined by the *lex fori,* the law of the country to the tribunals of which the appeal is made'. The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right."

Scrutton L.J. continued at page 109:—

"Now (the English court) has also a claim by a person who has a hypotheque .... It is proved to be, not a right of property in the ship, but a right to arrest the ship in the hands of a subsequent owner. But such a right is the same as a maritime lien as described by Mellish L.J. in *The Two Ellens,* by Gorell Barnes J. in *The Ripon City,* and by this Court in *The Tervaete.* And the English Courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man...."

The relevant passage in the judgment of Atkin L.J. is contained in the passage of the judgment of Hewson J. we have just quoted.

The judgment of Hill J. in the court below is reported in *Aspinall's* Maritime Law Cases at pages 147 and 148. Hill J. said at page 148:—

"The French mortgagee by French law has what has been described as a *jus in rem* ... a right to proceed by legal process for seizure and sale of the ship. But that is a right which travels with the *res* into whosesoever hands it may come...."

That right ... is a right which can be enforced whether the ship at the time of enforcement belongs to the debtor or to someone else; it is in the nature of a right of property ... not very different from the right of property under an English mortgage.... I therefore think that I am bound in this case to apply to that right the English law of priorities, and applying it, I am bound to say that the holder of the French registered mortgage has priority over the necessaries man."

In our opinion the interpretation put by the Supreme Court of Canada on the decision in *The Colorado* is the correct one. In our opinion all the three appellate judges, in affirming the decision of Hill J. in the court below, were of the view that having ascertained that under French law the right created by a hypotheque is a right equivalent to a maritime lien, an English court, applying English remedies, would rank a claimant under a hypotheque above an English necessaries man.

Similarly, having ascertained that under American law a person who furnishes in America repairs to a ship acquires a valid maritime lien on the ship, a Singapore court, applying Singapore remedies, would rank a claimant who has a valid maritime lien, which is in its nature a substantive right in the ship, above a claimant who has a mortgage over the ship.

For all these reasons we would allow both appeals with costs here and in the court below. We certify for two counsel.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Allen & Gledhill.*

WEE PENG WHATT v. SINGAPORE TRANSPORT SUPPLY SERVICES PTE. LTD. & ORS.*

[O.C.J. (Rajah J.) November 22, 1977]

[Singapore — Suit No. 932 of 1975]

Tort — Negligence — General duty of care — Master-servant relationship — Common law duty to take reasonable care for safety of servant.

Damages — Spinal injuries and paralysis — Sum awarded, $177,305.

The plaintiff, aged 30, was employed by the first defendants as a labourer to unload goods from their lorries on the quayside into the holds of tongkangs. The first defendants had hired two mobile cranes from the second defendants. The third defendant was the owner of the cranes one of which was driven by one Teng. On the day of the accident, the plaintiff was in the tongkang carrying out his duties in the unloading when the said Teng in the course of lowering cartons of milk stacked on a pallet into the tongkang lowered it on the person of the plaintiff thereby causing the following injuries:—

* Affirmed by Court of Appeal on April 18, 1978.